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IN THE

Supreme Court of the United States

October Term, 1942.

No. 983.

JOHN M. WHELAN & SONS, INC.,
Petitioner,

v.

THE UNITED STATES.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The question as stated on page 3 of the respondent's brief is not, in our opinion, the question. The question is whether or not the Government in addition to the cost of completing the building should recover consequential and speculative damages and also liquidated damages, all of which the Court of Claims of the United States awarded (Items 1, 2, 3 and 4; Finding 8; R. 66, 67).

On page 6 of respondent's brief, it is stated:

> "The questioned items are 'excess costs' which Article 9 of the contract expressly stipulates shall be recovered in these circumstances."

The questioned items are not costs, but damages. Petitioner is complaining about the award of both liquidated and special damages.

The footnote of respondent's brief, page 6 thereof, states that no item of the award is liquidated damages. Item 4 in the wording of the Court below reads:

> "Damages accrued between November 30, 1934, completion date under plaintiff's contract and December 4, 1934, when plaintiff defaulted, calculated at the rate of $25.00 specified in the liquidated damage clause of Article 9 of the contract."

The Court below did award liquidated and consequential damages, as well as the costs of completing the buildings (Items 1, 2, 3 and 4; Finding 8; R. 66, 67).

On page 10, in the conclusion of its brief, the respondent states:

> "The decision below is correct and is in accord with previous decisions of the court below and of this court."

The accuracy of that statement is challenged. The decision of the Court of Claims definitely is not in accord with its previous decisions. As late as 1941 the Court of Claims of the United States in the decision in *Maryland Casualty Company v. United States,* 93 C. Cls. 247, expressly held that the Government could not recover both excess cost of completing the buildings and liquidated damages. The court stated at page 254:

> "Article IX gives the Government the choice of permitting the contractor to continue and collecting $35 per day as liquidated damages for delay, or of pursuing the other course by taking over and finishing the work, and collecting the excess costs incurred in the completion of the contract.
>
> "By its terms it does not give the Government the right to collect both.

> "The defendant having exercised its right to terminate the contract and to proceed with its completion, it thereby waived its claim to liquidated damages. *Fidelity Casualty Co. of New York v. United States,* 81 C. Cls. 495; *Commercial Casualty Insurance Co. v. United States,* 83 C. Cls. 367; *American Employer's Insurance Company of Boston v. United States,* 91 C. Cls. 231; *U. S. for Use and Benefit of General Lighterage Company v. Maryland Casualty Co.,* 25 Fed. Supp. 778."

And again at page 255:

> "The defendant had the right to terminate the contract at any time after November 24, 1936. It did not choose to do so until February 23, 1937. At that time it did exercise its choice, and having done so, was bound thereby. The defendant therefore is not entitled to charge the item of $3,185 as liquidated damages."

As recently as December of 1941, the United States Court of Appeals for the District of Columbia made the same ruling. The opinion was written by Chief Justice Groner and concurred in by Miller and Rutledge, JJ., (now Supreme Court Justice). The name of the case is *United States v. Cunningham,* 125 F. (2d) 28. In that case the Court was considering the identical article in a government contract, and the Court said that to interpret and apply it as the Government here contends would be

> ". . . not only to disregard the plain, unambiguous language of the Government's own contract, but to make a new and different contract for the parties, and this we have already said we may not do. The rule has always been that liability upon a contract such as this may be established only by strict compliance with its conditions." (P. 32.)

Chief Justice Groner in his discussion reviewed the previous rulings of the Court of Claims, which at that time had been uniform and were uniform up until the present decision. The court said at pages 31 and 32:

> "*Second.* The other item constituting the judgment was, as we have seen, for moneys unlawfully retained by the United States as liquidated damages for delay in completion. The deduction was made under Article 9, by the terms of which the contractor was required to prosecute the work to completion within the specified time, failing which the United States were given two rights—*one,* to take over the work and complete it and hold the contractor for any excess cost; *the other,* to permit the contractor to continue the work subject to the right of the United States to retain out of the contract price liquidated damages for each calendar day of delay until the work should be completed. We think these rights are alternative. The article states that if the Government does not terminate the right of the contractor to proceed, then the contractor shall continue the work and liquidated damages may be assessed.
>
> "But in this case the United States did terminate the contract and did take over and complete the work and did collect the excess costs. Having chosen this method of completing the contract, they cannot also claim the other alternative of liquidated damages. Simliar provisions in government contracts have been consistently so construed by the Court of Claims. See particularly, Fidelity & Casualty Co. of New York v. United States, 81 Ct. Cl. 495; Commercial Casualty Ins. Co. v. United States, 83 Ct. Cl. 367. In the first named case the Court of Claims said: 'The defendant elected to choose the first of these alternatives and when that decision was made the second alternative disappeared from the picture. It was thereafter mere

surplusage. Upon the termination of the contract no liquidated damages could be charged to or be recoverable from the contractor.' 81 Ct. Cl. page 502.

"The same conclusion was reached in United States v. Maryland Casualty Co., D. C., 25 F. Supp. 778, 780, where the court said: 'The Government protected itself under the contract in two different ways. It could take over the work and complete it, charging any extra cost and expense to contractors; or it could wait until the job should be completed by the contractors, then collect as liquidated damages the per diem amount agreed upon. It could not adopt both courses. The two methods are inconsistent. The Government has chosen the first one, taking the work out of the hands of the contractors who cannot now complete it.'

"This view was adhered to in American Employer's Ins. Co. v. United States, 91 Ct. Cl. 231, though in that case the contract was for several different buildings with different completion dates. Some had been fully completed when the contract was terminated by the government; others had not. As to the former the court applied the provision for liquidated damages, but allowed only excess costs as to the latter.

"The only case cited by the United States where liquidated damages and excess costs were both recovered under a contract such as we have here is Continental Casualty Co. v. United States, 5 Cir., 113 F. 2d 284, affirming D. C., 29 F. Supp. 598, certiorari denied, 311 U. S. 696, 61 S. Ct. 133, 85 L. Ed. 451. However, the question whether these are alternative rights was not mentioned in either the Circuit Court or the District Court opinion and does not appear to have been raised by the parties."

What the Government seeks is to recover damages from the contractor by reason of the Government's own delay.

The damages which the Court below allowed accrued during the period of time when the completion of the buildings and the control of the work were entirely within the hands of the Government. This contract cannot be read to give the Government the right which it now asserts unless the plain, unambiguous language of the contract is wholly disregarded and the previous decisions of the Court of Claims be overruled.

It is submitted that this Court should grant a certiorari.

Very respectfully submitted,

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